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In the Supreme Court of the United States

OCTOBER TERM, 1977

IRVING BERLIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1977. The petition for a writ of certiorari was filed on October 12, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavits accompanying the application for an order authorizing electronic surveillance sufficiently established that other investigative methods were inadequate.

2. Whether the search of petitioner Sarfaty's wife's purse before she was permitted to leave their apartment during the execution of a search warrant violated the Fourth Amendment.

STATEMENT

Following a jury-waived trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of conducting an illegal gambling business in violation of 18 U.S.C. 1955 and 2.[1] The court of appeals affirmed (Pet. App. A).

The evidence at trial consisted of a stipulation of facts that demonstrated that petitioners together conducted a gambling enterprise in violation of state law that did business in excess of $2,000 per day (Pet. 4).

ARGUMENT

1. Petitioners contend (Pet. 11-12) that the application for the electronic surveillance from which much of the prosecution's evidence was derived did not show in sufficient detail that "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c). The supporting affidavits, however, belie this contention.[2]

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[1]Petitioners Berlin, Edelstein, and Sarfaty were sentenced to imprisonment for a year and a day and were ordered to serve two years' probation and to pay fines of $3,000 each. Petitioners Singer and Jarrett were sentenced to four months' imprisonment to be followed by two years' probation, and to pay fines of $2,000 each (C.A. App. 7).

[2]An initial affidavit dated November 7, 1974, accompanied an application for installation of "touch-tone decoders" that disclose the numbers dialed from the target telephones. That affidavit was incorporated by reference into the affidavit of December 4, 1974, the adequacy of which is contested by petitioners. An affidavit dated December 11, 1974, which included information derived from the previously authorized surveillance, was submitted with a final application. We are lodging copies of these affidavits with the Clerk of this Court.

The requirements of 18 U.S.C. 2518(1)(c) are satisfied if the application and its supporting affidavit, viewed in a practical and commonsense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), provide a sufficient factual basis for the issuing authority to conclude that traditional investigative techniques will be inadequate to expose the full scope of the criminal activity under investigation or the identity of the participants therein. See, *e.g.*, *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Sklaroff*, 552 F. 2d 1156, 1159 (C.A. 5), petitions for a writ of certiorari pending, Nos. 77-164 and 77-169; *United States* v. *Scibelli*, 549 F. 2d 222 (C.A. 1), certiorari denied, June 6, 1977, No. 76-1212; *United States* v. *McCoy*, 539 F. 2d 1050 (C.A. 5), certiorari denied, 431 U.S. 919; *United States* v. *Armocida*, 515 F. 2d 29, 38 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, 423 U.S. 858; *United States* v. *Brick*, 502 F. 2d 219 (C.A. 8). The application in the present case provides such a factual basis.

In the December 4, 1974 affidavit accompanying the application, F.B.I. Agent Gary W. Hart detailed the facts and circumstances surrounding the offense and the targets' participation. The affidavit averred that the government's information up to that point derived from visual observation over a three month period, the use of three reliable informants, the use of court authorized "touch-tone decoders" that revealed the telephone numbers to which illegal wagers were forwarded, and telephone company records. This cumulation of evidence, however, was not sufficient to insure that a violation of 18 U.S.C. 1955 could be proved at a trial, since the informants refused to testify out of fear for their personal safety. While the sources of information noted above supplied probable cause to believe certain individuals were implicated, they could not provide evidence as to the

bookmaking activities that were carried on inside private residences and offices. Moreover, in Agent Hart's experience, the use of search warrants would be ineffective because gambling records often were sketchy, difficult to interpret, and easy to destroy. Finally, drawing on his more than four years' experience in investigating illegal gambling activities, Agent Hart concluded that continued surveillance and other normal investigative techniques would be unsuccessful. This was a sufficient showing to warrant authorization of the intercept orders.

"[T]he purpose of the requirement in section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted." *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909. See also *United States* v. *Kirk*, 534 F. 2d 1262, 1274 (C.A. 8), certiorari denied, June 27, 1977, No. 75-7001. Here, normal investigative methods were followed and found to be insufficient. Others were not attempted because it was the opinion of the agent, based on considerable experience, that no benefit would be derived therefrom. The statutory requirements were thus satisfied.

Petitioners allege, however, that the decision in this case conflicts with the Ninth Circuit's decision in *United States* v. *Kalustian*, 529 F. 2d 585. We acknowledge that the *Kalustian* panel appears to have interpreted 18 U.S.C. 2518 to require somewhat greater specificity in the supporting affidavits than has been required by other courts. But that opinion has not been followed in any other circuit[3] and does not even represent the consistent

[3]See, *e.g.*, *United States* v. *Scibelli*, *supra*; *United States* v. *Hinton*, 543 F. 2d 1002, 1011 (C.A. 2); *United States* v. *Kirk*, *supra*.

view of the Ninth Circuit.[4] Indeed, in *United States* v. *Spagnuolo*, 549 F. 2d 705 (C.A. 9), the court recognized that its circuit's decisions in this area "often lead to results difficult to harmonize" and tried "to promulgate a manageable standard by which to judge affidavits under section 2518(1)(c)." 549 F. 2d at 709-710. The standard it adopted is that "the affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand * * *. An affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with section 2518(1)(c). *Kalustian* teaches no more than that." 549 F. 2d at 710. The Ninth Circuit standard as promulgated in *Spagnuolo* was clearly met here. Accordingly, even assuming that some conflict remains between the standard used in the Ninth Circuit and elsewhere, this case does not directly present that issue.[5]

[4]See *United States* v. *Pezzino*, 535 F. 2d 483 (C.A. 9); *United States* v. *Scully*, 546 F. 2d 255 (C.A. 9), certiorari denied, 430 U.S. 970; *United States* v. *Turner*, 528 F. 2d 143 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996.

[5]Since no other court of appeals has followed *Kalustian*, and since the Department of Justice has after *Kalustian* made efforts to conform its applications to the stringent standards of that case (the present applications were submitted about six months before the *Kalustian* decision), we have not believed it justified to ask this Court to review those cases that we have lost in the Ninth Circuit on the basis of this issue. Moreover, this Court has, since the time of the *Kalustian* decision, declined numerous requests to review decisions from the Ninth Circuit and other circuits alleged to be in conflict with *Kalustian* (see *e.g.*, cases cited *supra*, notes 3 and 4); and nothing has happened recently to justify any change in this Court's refusal to review what is, at heart, an intra-circuit conflict of little continuing importance. Cf. *Wisniewski* v. *United States*, 353 U.S. 901.

2. Petitioners' contention (Pet. 13) that evidence seized from Mrs. Sarfaty's purse should have been suppressed is without merit. During the search of the Sarfaty apartment pursuant to a warrant, Mrs. Sarfaty, who was there when the F.B.I. agents arrived at approximately 7:30 a.m. (Pet. 9), stated that she wished to leave the premises. An agent reasonably suspected that evidence might be secreted in the purse she intended to take with her; accordingly, the purse was searched before she was permitted to remove it from the apartment.[6] The search revealed two $10,000 certificates of deposit and a bank safe deposit box key that was among the objects specifically authorized to be seized.[7]

Petitioners assert that the search of the purse was equivalent to a search of Mrs. Sarfaty's person (Pet. 13-14). But petitioners have no standing to assert an invasion of Mrs. Sarfaty's personal Fourth Amendment rights. *Alderman* v. *United States,* 394 U.S. 165, 171-175; *United States* v. *Lisk,* 522 F. 2d 228, 230 (C.A. 7), certiorari denied, 423 U.S. 1078; *Mabra* v. *Gray,* 518 F. 2d 512, 513 (C.A. 7). In any event, the search of the purse, which was among the Sarfaty possessions that were in the apartment when the agents arrived with the search warrant, was simply an incident of the apartment search. Therefore, in the circumstances of this case, the search of the purse was clearly reasonable under the Fourth Amendment. See *United States* v. *Micheli,* 487 F. 2d 429, 431-432 (C.A. 1);

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[6]The clothing that Mrs. Sarfaty selected to wear was also inspected by an agent before she put it on and left the apartment. However, since that inspection produced no evidence there is no occasion to consider the propriety of that search.

[7]The bank safe deposit box was subsequently searched pursuant to a warrant. Petitioners do not challenge the legality of that search.

United States v. *Johnson,* 475 F. 2d 977, 979 (C.A. D.C.); *United States* v. *Teller,* 397 F. 2d 494, 497-498 (C.A. 7), certiorari denied, 393 U.S. 937; *Walker* v. *United States,* 327 F. 2d 597, 600 (C.A. D.C.), certiorari denied, 377 U.S. 956. Compare *United States* v. *Branch,* 545 F. 2d 177, 181-182 (C.A. D.C.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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